

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

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4-7-17
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OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR,

Plaintiff,

v.

GOOGLE, INC.,

Defendant.

OALJ Case No. 2017-OFC-00004

OFCCP No. R00197955

PLAINTIFF'S PRE-HEARING STATEMENT

Case Subject to Expedited Proceedings under 41 C.F.R. § 60-30.31

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MAR 28 2017

Office of Administrative Law Judges
San Francisco, Ca

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Pursuant to the Court's Notice of Hearing and Pre-Hearing Order, Plaintiff Office of Federal Contract Compliance Programs ("OFCCP") submits the following pre-hearing statement.

I. Statement of Issues in the Proceeding

The Court's rulings have substantially narrowed the issues left for the upcoming hearing. The Court has already held that the bulk of the data OFCCP requested "meet the deferential standard for relevance." Mar. 15, 2017 Order on Summ. J. ("Summ. J. Order") at 7. Thus, the most prominent issue at the hearing will be whether Google, *the eighth most profitable business in the entire country*,¹ can prove it will face an unconstitutional undue burden in supplying information relevant to determining whether it has complied with non-discrimination obligations. Google is in an extremely poor position to demonstrate any burden or hardship for at least five reasons.

First, Google cannot point to any burden it will suffer in complying with OFCCP's requests. Google's only substantiated example of its purported burden is the cost of compiling a limited subset of the information OFCCP requests from various source materials and creating and populating a database to produce to OFCCP in satisfaction of this request. Yet, in November 2016, OFCCP offered to bear this precise burden, advising Google that it will consider the request for this information satisfied if Google simply produces the source materials. OFCCP has been and remains amenable to bear the cost of extracting the information it needs from such source materials so that it may complete its investigation.

Second, as courts in a majority of circuits require, Google must prove an undue burden by demonstrating that compliance "threatens to unduly disrupt or seriously hinder normal operations of [its] business." *FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977). However,

¹ Fortune Magazine ranked Google as the eighth most profitable company in the country. *See* Hrg. Ex. 209 (2016 *Forbes* article on most profitable companies).

undertaking the analysis most courts apply, Google's purported cost of production is a miniscule 0.0024% of its 2016 operating costs, indicating OFCCP's requests could not impose such a burden. Indeed, belying Google's claim of undue burden are Google representatives' statements that many of the items OFCCP requested, such as job and salary history, are readily available in Google's electronic databases.

Third, even if the Court were to conduct the equitable balancing test the Eleventh Circuit announced in *EEOC v. Royal Caribbean*, the scales tip sharply in OFCCP's favor. Here, OFCCP is tasked with conducting an establishment-wide compliance audit of Google's headquarters based on Google's Affirmative Action Plan ("AAP"), which Google defined to encompass *all* of its approximately 20,000 employees. By developing such a broad, all-inclusive AAP, Google created much of the burden about which it now complains. To conduct even a marginally competent audit, OFCCP must have access to compensation and hiring data for each of these individuals to determine whether Google is in compliance. OFCCP's requests are narrowly tailored to seek only the information it needs to complete its audit, and nothing else. There is no altering the fact that OFCCP's task here is a large one—auditing an operation as large as Google's headquarters. Google's only specific purported cost in producing this information—a burden which OFCCP months ago agreed to bear—is far outweighed by OFCCP serving the public interest by enforcing a law with which Google committed to comply when it sought and obtained a five-year contract the company valued to be worth \$25 million in taxpayer funds.

Fourth, although mentioned in the Court's previous burden analysis, Google's revenue from federal business has no bearing on whether Google will suffer an unconstitutional burden. Following the Supreme Court, the Secretary decided decades ago the amount a federal contractor

receives is irrelevant to whether that contractor's compliance with Executive Order 11426 imposes an unconstitutional burden. There is and cannot be any sliding scale of compliance with federal law based on the size of the federal contract. In any event, since June 2, 2014, Google's federal business has far exceeded the cost of producing OFCCP's requested items.

Finally, Google has announced with great public fanfare that it has a \$150 million plan to address diversity issues. *See* Hrg. Ex. 210 (*USA Today* article). Given this spending, Google cannot now plead poverty as a basis for denying access to an entity charged, on the public's behalf, with determining whether Google complies with its basic non-discrimination obligations.

Google is not some casual, small-time federal contractor that did not realize what it was in for by signing one contract for a small dollar amount but meeting coverage thresholds. Google has had covered federal contracts since at least 2007, has earned at least tens of millions of dollars from these contracts, and has even filed a successful high profile lawsuit in an attempt to win lucrative federal contracts. By the beginning of the current review period, Google had already been subject to four OFCCP reviews, and in 2011, the company entered into a Compliance Agreement agreeing to remedy recordkeeping violations at one facility. In short, Google is a large, sophisticated employer that has the ability to secure and receives the benefit of good and qualified counsel. Google well understands the obligations it takes on when it secures business from the government. As a federal contractor in the past several years, it has obtained contracts worth more than \$25 million, and there is no question that it has the resources to come into compliance without any disruption to its operations. Google likely has spent far more in legal fees in its effort to resist compliance than it would have paid if it simply complied.

Indeed, Google's resistance to producing the Subject Items was based primarily on the other issue for the hearing: relevance. However, as noted above, the Court has already deemed

the bulk of what OFCCP requested to be relevant. Moreover, the Court has deprived Google of its primary argument on relevance, ruling that “OFCCP need not engage in an iterative process with Google, explaining the status the investigation when it requests further information.”

Summ. J. Order at 7. At the hearing, OFCCP will reinforce the relevance of the requested items, including through explaining that employees’ names and contact information are relevant because they enable the agency to speak to employees freely to ensure Google has complied with its equal opportunity obligations.

Because the hearing will be limited to whether OFCCP can establish the relevance of employees’ names and contact information and whether Google can prove an undue burden, OFCCP expects that the parties’ presentations will be complete on April 7. Following that presentation, the Court should grant OFCCP the requested relief, which includes directing Google to produce the following:

- a compensation database as of September 1, 2014 for the employees Google identified in its Affirmative Action Plan (“AAP”) that includes the data Google produced with respect to the September 1, 2015 compensation snapshot, along with the additional data requested in the June 1, 2016 letter;²
- the full job and salary history for the employees in Google’s September 1, 2015 compensation snapshot and the requested September 1, 2014 compensation snapshot;³ and

² The additional data identified in that letter are: bonus earned, bonus period covered, campus hire or industry hire, competing offers, current compa ratio, current job code, current job family, current level, current manager, current organization, date of birth, department hired into, education equity adjustment, hiring manager, job history, locality, long-term incentive eligibility and grants, market reference point, market target, name, performance rating for past 3 years, prior experience, prior salary, referral bonus, salary history, short-term incentive eligibility and grants, starting compa ratio, starting job code, starting job family, starting level, starting organization, starting position/title, starting salary, stock monetary value at award date, target bonus, and total cash compensation. OFCCP also requested data on “other factors [Google uses] for compensation,” which was intended to permit Google to provide any other data it found relevant. *See, infra*, n.8.

³ Job and salary history is a subset of the data identified in the June 1, 2016 letter, including starting compa ratio, starting job code, starting job family, starting level, starting organization, starting position/title, starting salary, prior salary, and prior experience.

- the names and contact information for the employees in the September 1, 2015 and the September 1, 2014 snapshots (hereinafter, the Subject Items).

II. List of Stipulated Facts

After conferring in good faith, the parties agreed to several stipulated facts, which are shown in Appendix A. Because those facts are voluminous, OFCCP summarizes several of the key stipulations below:

- Since at least June 2, 2014, Google has had 50 or more employees and a contract of \$100,000 or more (Stip. Facts Nos. 2-3), making it a federal contractor covered by the relevant recordkeeping and access requirements.
- Over six months, OFCCP and Google exchanged multiple letters and held several calls regarding the Subject Items (*see* Stip. Facts Nos. 14-17, 19-22, 24-27), demonstrating OFCCP's good faith efforts to resolve the parties' dispute.
- Google does not assert defenses based on how OFCCP selected it for a compliance review or whether OFCCP satisfied any duty to conciliate. *See* Stip. Facts Nos. 8, 28.

III. List of Disputed Facts

Based on the parties' stipulations and the Court's Summary Judgment Order, the following issues are the matters remaining in dispute:

- Whether employees' names and contact information are relevant to OFCCP's compliance evaluation; and
- Whether Google will face any undue burden or hardship in producing the Subject Items.

IV. Brief Statements of Applicable Law and Conclusions to Be Drawn from Testimony and Documents to be Offered

A. Google is Subject to the Recordkeeping and Access Requirements Enforced by OFCCP.

There is no dispute that Google is a covered federal contractor subject to the recordkeeping and access requirements under Executive Order 11246 ("Executive Order"), Section 503 of the Rehabilitation Act and the Vietnam Era Veterans Readjustment Assistance

Act (“VEVRAA”). First, since at least June 2, 2014, Google has had 50 employees or more, satisfying the employee threshold for these laws.⁴ Stip. Fact No. 2. Second, since that date, Google has had at least one contract satisfying the relevant coverage thresholds,⁵ which is “measured by the total amount of orders the parties reasonably anticipate to be placed during the life of the contract.” *OFCCP v. Star Machinery*, Case No. 83-OFC-4, 1983 WL 509225, at *3 (D.O.L. Sec’y Dec. Sept. 21, 1983). On that date, Google entered into AIMS Contract, which it anticipated would generate \$25 million over its five-year term. Stip. Fact No. 3; *see also* Hrg. Ex. 2 at 3 (estimating annual sales to be \$5 million); Hrg. Ex. 3 at 1A (providing five-year term).

B. Google Consented to Produce the Materials OFCCP Requested.

Google freely contracted away any right to object to requests made by OFCCP here. The scope of its consent was broad: the AIMS Contract provides that Google must, in the context of a compliance evaluation, permit OFCCP to access records and materials “that may be relevant to the matter under investigation and pertinent to compliance with Executive Order 11246.” Stip. Fact No. 5. Because the Subject Items plainly fall within this scope, any argument Google advances must fail because they waived any right to make this argument by explicitly consenting to provide the information requested by OFCCP.⁶

⁴ *See, e.g.*, 41 C.F.R. § 60-2.1(b) (under the Executive Order, requirement to develop AAP imposed on employers with 50 employees or more); 41 C.F.R. § 60-741.40(a) (same, under Rehabilitation Act); 41 C.F.R. § 60-300.40(a) (same, under VEVRAA).

⁵ *See, e.g.*, 41 C.F.R. § 60-2.1(b) (\$50,000 threshold under the Executive Order); 41 C.F.R. § 60-741.40(a) (same, under Rehabilitation Act). Before October 2015, businesses with contracts of \$100,000 or more and 50 employees or more were subject to requirements of VEVRAA. 41 C.F.R. § 60-300.40(a). In October 2015, the VEVRAA dollar-amount threshold was raised to \$150,000. 80 Fed. Reg. 38293 (July 2, 2015).

⁶ While the Court has stated that Google has not made a “complete waiver of its Fourth Amendment rights” (Summ. J. Order at 4 n.5), OFCCP has never contended such a complete waiver is necessary. OFCCP has argued only that Google waived its protections in the context of the Subject Items. OFCCP also notes that *United States v. Golden Valley Electric Association*, 689 F.3d 1108 (9th Cir. 2012), which the Court cited in its Summary Judgment Order in discussing Google’s waiver of Fourth Amendment rights, did not address waiver.

The “touchstone of [the Fourth] Amendment analysis has been the question whether a person has a constitutionally protected reasonable expectation of privacy.” *Oliver v. United States*, 466 U.S. 170, 177 (1984). No such expectation exists when a person gives consent to a search that is “not the result of duress or coercion, express or implied.” *Schneckloth v. Bustamonte*, 412 U.S. 218, 248 (1973).

It is long-settled that a business may give this consent and bargain away its Fourth Amendment rights in exchange for a government contract. *See, e.g., Zap v. United States*, 328 U.S. 624, 628 (1946) (“[W]hen petitioner, in order to obtain the government's business, specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts.”), *vacated on other grounds*, 330 U.S. 800 (1947); *see also United States v. Schleining*, 181 F. Supp. 3d 531, 537 (N.D. Ill. 2015) (holding government contractor “to the terms of a contract in which it voluntarily relinquished Fourth Amendment rights in exchange for a valuable business opportunity”).

Here, Google consented to produce the Subject Items when it entered into the AIMS Contract because they “may be relevant” to the ongoing compliance evaluation. Google is a particularly poor position to dispute its consent now since it has enjoyed the benefits of this and other federal contracts for years. Having received the primary benefit of the AIMS Contract—and in light of its determined undertaking to seek even more federal business in the future—Google cannot and does not contend that it did not understand or freely agree to the contractual language requiring it to produce the information OFCCP requested.

Google’s consent means that the analysis of whether Google must produce the Subject Items turns on whether they “may be relevant” to the compliance evaluation. As noted above,

the Court has already held that the September 1, 2014 compensation snapshot and data on all of the factors OFCCP has requested “meet the deferential standard for relevance.” Summ. J. Order at 7. That some of the data, such as job and salary history, touch on years before the current review period has no bearing on their relevance. Because Google has not disputed that those data affected pay during the review period, such data are part of the review period,⁷ much like any written policies Google may have had that were operative during the review period but adopted outside of it.

Indeed, further reinforcing the Court’s ruling, Google has conceded that data on many of the factors OFCCP requested are relevant to their pay practices. For instance, documents Google produced and testimony offered by Google representatives provide that employees’ evaluations are relevant to whether they receive pay raises. *See* Hrg. Ex. 216. As another example, Google representatives (Ajit Nambiar, Frank Wagner, and Jennifer Sunday) stated during an on-site visit that education, work histories, prior salary, and competing offers play a role in setting pay at the company. Stated simply, consistent with its procedures and general statistical practices, OFCCP seeks all information that sheds light on whether Google satisfies its equal opportunity obligations, including information that Google said are relevant.⁸ *See* OFCCP Dir. 2013-03 (providing that, to evaluate pay practices, agency “considers all relevant factors offered by the contractor to determine whether these factors, in conjunction with other legitimate factors”); Fed.

⁷ Congress has recognized in the Lilly Ledbetter Fair Pay Act of 2009 that discriminatory acts outside of Title VII’s limitations period may be actionable insofar as they affect pay within that period. *See* 42 U.S.C. § 2000e-5(e)(3)(A) (providing that “an unlawful employment practice occurs . . . when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice”).

⁸ To this end, OFCCP also requested data on “other factors [Google uses] for compensation,” which the OMB-approved scheduling letter also invited Google to provide. *See* Hrg. Ex. 5 (Scheduling Letter), Itemized Listing ¶ 19.b (“You may provide any additional data on factors used to determine employee compensation[.]”). OFCCP did so, not because it is unclear as to which factors matter, but rather to permit Google to submit any data it saw relevant, in addition to those OFCCP had requested. OFCCP seeks to avoid making and disclosing findings, only to have a contractor later say that the agency failed to consider other factors relevant to its pay practices.

Judicial Ctr., Reference Manual on Scientific Evidence at 305 (“In a case alleging sex discrimination in salaries, . . . a multiple regression analysis would examine not only sex, but also other explanatory variables of interest, such as education and experience.”), *available at* [http://www.fjc.gov/public/pdf.nsf/lookup/SciMan3D01.pdf/\\$file/SciMan3D01.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/SciMan3D01.pdf/$file/SciMan3D01.pdf).

Given the Court’s ruling establishing that the data OFCCP requested are relevant, OFCCP will focus at the hearing on demonstrating the relevance of employees’ names and contact information. OFCCP will explain that it needs such information to conduct confidential interviews with Google employees about the company’s pay practices. Courts have long recognized that employee reports are vital to an enforcement agency’s ability to determine an employer’s compliance with the law. *See, e.g., Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 11 (2011) (in FLSA case, noting government’s reliance on “information and complaints received from employees seeking to vindicate rights claimed to have been denied”); *EEOC v. McLane Co., Inc.*, 804 F.3d 1051, 1057-1058 (9th Cir. 2015) (holding employee contact information relevant to investigation into whether discrimination occurred).

Talking to employees is a particularly essential part of any competent OFCCP investigation because OFCCP is tasked here with determining whether Google’s hiring and compensation policies *in fact* do not result or cause unlawful discrimination on the basis of race, sex, gender, national origin or other protected basis. In order to make such a determination, it is not enough for OFCCP to just review Google’s written policies, talk to Google’s human resources personnel, and make data runs. It is sound and fundamental investigative practice to test how Google’s processes are applied and experienced by talking to the employees who live and breathe these policies every day at Google. Without names and contact information, OFCCP’s ability to conduct a valid and sound investigation—which should be goal of not just

OFCCP, but also of Google—is compromised. Indeed, OFCCP has long been puzzled by Google’s opposition to this request. Department of Labor agencies and private plaintiffs’ counsel⁹ routinely request and obtain employee names and contact information as part of investigations or litigation. Google should want these conversations between its workforce and OFCCP to happen to demonstrate compliance. Generally speaking, if an employer is complying with the law, employees will readily confirm that compliance.

C. The Fourth Amendment Does Not Empower Google to Refuse OFCCP’s Requests.

As the Court already held, “Google faces a significant obstacle on any Fourth Amendment defense because it consented to Government intrusion when it agreed to the government contract.” Feb. 21, 2017 Order Denying Mot. re Expedited Procedures (“Expedited Procedures Order”) at 3.¹⁰ Even had Google not consented, however, application of a Fourth Amendment analysis here would not relieve Google of any obligation to produce the Subject Items. The Court has already held that the bulk of the Subject Items are relevant and, to date, Google has not and cannot establish any undue burden as to what OFCCP has requested.

⁹ See, e.g., *Benedict v. Hewlett-Packard Co.*, Case No. C 13-0119 LHK, 2013 WL 3215186, at *2 (N.D. Cal. June 25, 2013); *Holman v. Experian Info Solutions, Inc.*, Case No. C 11-0180 CW, 2012 WL 1496203 (N.D. Cal. Apr. 27, 2012) (allowing “discovery of putative class members’ confidential information subject to a protective order, without requiring prior notice”) (citing cases); *Artis v. Deere & Co.*, 276 F.R.D. 348, 352 (N.D. Cal. 2011) (ordering production “of names, addresses, and telephone numbers”, which “is a common practice in the class action context”).

¹⁰ Indeed, in *First Alabama*, which Google argues applies, the court held with respect to consent:

[R]elevant to its reasonableness is First Alabama’s express and voluntary contractual undertaking to assume the obligations of E.O. 11246, including its information access provisions. Such an undertaking significantly decreases the urgency of First Alabama’s claim to privacy in the documents which it had agreed to provide. Following the course pursued by the Supreme Court in *United States v. Martinez-Fuerte*, 428 U.S. 543, 555, 96 S.Ct. 3074, 3081, 49 L.Ed.2d 1116 (1976), we weigh a relatively low privacy interest—as indicated by the small burden on the bank and the fact that it obligated itself to provide the requested information—against a relatively strong public interest in providing for full equal employment opportunity.

First Ala. Bank of Montgomery, N.A. v. Donovan, 692 F.2d 714, 720–21 (11th Cir. 1982).

Google has insisted that the Court apply the Fourth Amendment analysis applicable to administrative subpoenas. Yet, under such an analysis, “rather minimal limitations” exist. *See v. City of Seattle*, 387 U.S. 541, 545 (1967); *see also United States v. Golden Valley Elec Ass’n*, 689 F.3d 1108, 1115 (9th Cir. 2012) (“In the context of an administrative subpoena, the Fourth Amendment’s restrictions are limited.”) (quoting *Reich v. Mont. Sulphur & Chem. Co.*, 32 F.3d 440, 448 (9th Cir. 1994)). For Fourth Amendment purposes, “it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant.” *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *see also Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 415 (1984) (“[T]he Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.”) (quoting *City of Seattle*).

The Summary Judgment Order focused this case on whether the information OFCCP has requested is relevant and not unreasonably burdensome.¹¹ The standards governing both elements are discussed below.

1. The Court’s role in evaluating relevance is limited and deferential.

The Court applies a “deferential standard for relevance.” Summ. J. Order at 7. Under this standard, a “court defers to the agency’s appraisal of relevancy, which must be accepted so long as it is not obviously wrong.” *N.L.R.B. v. Am. Med. Response*, 438 F.3d 188, 193 (2d Cir. 2006); *see also Dir., Ofc. of Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1307 (D.C. Cir. 1997) (“If the dispute turns on the *relevance* of the information sought by a

¹¹ The Court has already held that “OFCCP . . . is acting within its authority to define the scope of the compliance review to include Google’s entire Mountain View workforce,” ending any debate on the authority element of the *Morton Salt / Lone Steer* test. Summ. J. Order at 6. Thus, as the Court stated, the hearing will focus on the remaining elements: whether “OFCCP’s requests in their entirety are both relevant to the compliance review and not unreasonably burdensome.” *Id.*

government agency, we have said that the district court should not reject the agency's position unless it is 'obviously wrong.' (emphasis in original); *EEOC v. Randstad*, 685 F.3d 433, 448 (4th Cir. 2012) (noting "we largely defer to the EEOC's expertise" with respect to relevance). As the D.C. Circuit has explained,

We give the agency a wide berth as to relevance because it need establish only that the information is relevant to its *investigation* not to a hypothetical adjudication, and as we have explained, the boundary of an investigation need only, indeed can only, be defined in general terms.

Vinson & Elkins, 124 F.3d at 1307 (citations omitted; emphasis in original). As a result, "the burden, as a practical matter, is on the defendant to" show that the agency's position on relevance is obviously wrong. *Id.* Once relevance has been demonstrated, courts "have no warrant to decide whether the [agency] could conduct the investigation just as well without it." *McLane*, 804 F.3d at 1057.

The Court has already held that the September 1, 2014 snapshot and all of the compensation-related data OFCCP "meet the deferential standard for relevance." Summ. J. Order at 7. And, as explained above, the requested employee names and contact information are relevant because they permit OFCCP to conduct the necessary employee interviews to evaluate Google's employment practices. OFCCP will readily meet the deferential relevance standard at the upcoming hearing.

2. Google cannot meet its heavy burden of proving that producing the requested information is unconstitutionally burdensome.

While Google claims that producing the Subject Items is unduly burdensome, the only cost Google has estimated is the cost of pulling the requested data on employees' education, prior experience, prior salary, and competing offers and creating and compiling that information into a database. *See* Hrg. Ex. 9 at 4-5. The obvious flaw in Google's cry of burden, however, is that OFCCP long ago offered to bear this cost as OFCCP offered to compile this information

from the source materials. Clearly put, OFCCP advised Google to just produce all the source materials (such as the resumes and interview notes) and OFCCP personnel would review and collect all of the information OFCCP needed to conduct its own analysis. As Google has not been asked to compile data or construct and populate a database—even though these are tasks in which Google claims expertise—the burden on Google is minimal. All Google needs to do is give OFCCP access to the remaining resumes and interview notes from which OFCCP, *at OFCCP's expense*, can harvest the information it needs to complete its investigation.

Google has the burden to prove its purported burden violates the Fourth Amendment. *See, e.g., Am. Med. Response*, 438 F.3d at 192-93 (“party opposing enforcement” must demonstrate undue burden); *Randstad*, 685 F.3d at 451 (same). “The burden of proving that an administrative subpoena is unduly burdensome is not easily met.” *Randstad*, 685 F.3d at 451.

a. The Federal Rules of Civil Procedure do not limit the scope of administrative subpoenas.

As an initial matter, OFCCP notes that the limits imposed on discovery by the Federal Rules of Civil Procedure, which the Court cited in its Summary Judgment Order, do not apply to administrative subpoenas. As a result, courts reject attempts to apply those limits to the scope of administrative subpoenas.

Federal Rule of Civil Procedure 45 “does not apply to the enforcement of subpoenas issued by administrative officers and commissions pursuant to statutory authority.” Fed. R. Civ. P. 45 advisory committee’s notes.¹² Thus, as the Ninth Circuit has explained,

The enforcement [of administrative subpoenas] is dependent upon the interpretation of statutory authority, not the interpretations of the discovery provisions of the Federal Rules of Civil Procedure.

¹² Federal Rule of Civil Procedure 45 incorporates limits imposed on discovery on parties under Rule 26. *See* Fed. R. Civ. P. 45(d); *see also* Fed. R. Civ. P. 45 advisory committee’s comments (noting “scope of discovery through a subpoena is the same as that applicable to Rule 34 and other discovery rules”).

EEOC v. Deer Valley Unified Sch. Dist., 968 F.2d 904, 906 (9th Cir. 1992). This is because the “function of administrative investigatory subpoenas differs from that of the discovery provisions of the Federal Rules of Civil Procedure.” *Id.*; *see also id.* (noting “discovery provisions apply to actions that have already been filed with the court” and “statutory subpoena authority, . . . is designed for administrative investigations”); *Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp.*, 5 F.3d 1508, 1513 (D.C. Cir. 1993) (“Unlike a discovery procedure, an administrative investigation is a proceeding distinct from any litigation that may eventually flow from it.”).

The Supreme Court recognized this long ago, holding that an agency has a broad “power of inquisition, . . . which is not derived from the judicial function.” *Morton Salt*, 338 U.S. at 642. That power “is more analogous to the Grand Jury, *which does not depend on a case or controversy for power to get evidence[.]*” *Id.* at 642 (emphasis added). Thus, in contrast to litigation, an agency “can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.” *Id.* at 642-43.

Given this crucial distinction, courts have rejected analyzing administrative subpoenas through the lens of the Federal Rules. *See, e.g., FTC v. Boehringer Ingelheim Pharmaceuticals, Inc.*, 898 F. Supp. 2d 171, 174 (D.D.C. 2012); *NLRB v. Vista Del Sol Health Servs., Inc.*, 40 F. Supp. 3d 1238, 1255 n.58 (C.D. Cal. 2014) (the “Federal Rules of Civil Procedure do not govern the Board’s administrative investigations”). Indeed, in “the administrative subpoena context, . . . a much stronger showing of ‘undue burden’ is required” than what is necessary under Rule 26. *Boehringer Ingelheim Pharmaceuticals*, 898 F. Supp. 2d at 174 (citing *Texaco*, 555 F.2d at 882); *see also Vista Del Sol*, 40 F. Supp. 3d at 1255 n.58 (rejecting burden analysis under Rule 26 in subpoena enforcement proceeding).

b. Google must demonstrate a threat to the normal operations of its business.

Google has contended that producing information on its employees' education, prior experience, prior salary, and competing offers will cost approximately \$1.5 million. Even if this figure were accurate, it would reflect a miniscule 0.0024% of Google's 2016 operating costs, demonstrating that complying with OFCCP's request would not disrupt Google's operations, the analysis the Court should use in evaluating Google's burden.

In a majority of circuits, courts hold that an administrative subpoena is unduly burdensome only if compliance with the subpoena "threatens to unduly disrupt or seriously hinder normal operations of a business." *Texaco, Inc.*, 555 F.2d at 882.¹³ While a court should consider the particular facts of a given case, that analysis primarily focuses on "the cost of production in the light of the company's normal operating costs." *Randstad*, 685 F.3d at 451 (citation omitted).¹⁴ Where the resisting party fails to proffer evidence of "its normal operating

¹³ In addition to the D.C. Circuit, the courts of appeal for the Second, Fourth, Fifth, Eighth, and Tenth Circuits have adopted this formulation or a similar standard. *See Am. Med. Response*, 438 F.3d at 193 (noting "courts have refused to modify investigative subpoenas unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business") (citation omitted); *Randstad*, 685 F.3d at 451 ("The burden of proving that an administrative subpoena is unduly burdensome is not easily met. . . . The party subject to the subpoena must show that producing the documents would seriously disrupt its normal business operations.") (citation omitted); *United States v. Chevron U.S.A., Inc.*, 186 F.3d 644, 649 (5th Cir. 1999) ("[A] subpoena is not unreasonably burdensome unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business."); *United States v. Whispering Oaks Residential Care Facility, LLC*, 673 F.3d 813, 819 (8th Cir. 2012) (holding that a subpoena was not unduly burdensome because it was not shown that compliance "will interfere with care at the facility"); *E.E.O.C. v. Citicorp Diners Club, Inc.*, 985 F.2d 1036, 1040 (10th Cir. 1993) ("A court will not excuse compliance with a subpoena for relevant information simply upon the cry of 'unduly burdensome.' Rather, the employer must show that compliance would unduly disrupt and seriously hinder normal operations of the business."). District courts in the First, Third, and Ninth Circuits have also applied this standard. *See, e.g., N.L.R.B. v. Champagne Drywall, Inc.*, 502 F. Supp. 2d 179, 182 (D. Mass. 2007) ("Not only does Champagne Drywall not detail how compliance would hinder its business, but that prospect seems unlikely."); *U.S. ex rel. Office of Inspector Gen. v. Philadelphia Hous. Auth.*, No. 10-0205, 2011 WL 382765, at *3 (E.D. Pa. Feb. 4, 2011) (A demand that is "unreasonably broad or burdensome" has been defined as a demand with which compliance threatens to unduly disrupt or seriously hinder normal operations of a business.) (citation omitted); *U.S. E.E.O.C. v. Aaron Bros., Inc.*, 620 F. Supp. 2d 1102, 1106 (C.D. Cal. 2009) ("Compliance with a subpoena is excused if it threatens to unduly disrupt or seriously hinder normal operations of a business.") (citation omitted).

¹⁴ *See also see also Chevron*, 186 F.3d at 649-50 (faulting Chevron for failing to demonstrate burden "relative to [its] size"); *N.L.R.B. v. A.J.D., Inc.*, Case No. 15 Misc. 326(JFK), 2015 WL 7018351, at *5 (S.D.N.Y. Nov. 12, 2015)

costs” or “that gathering the requested information would ‘threaten’ or ‘seriously disrupt’ [its] business operations,” burden objections fail as a matter of law. *Id.*¹⁵

Google has never shown that producing the Subject Items would disrupt its gargantuan business operation. Google has never made the argument, let alone offered any evidence, that “the cost of production in the light of the company’s normal operating costs” would be unduly burdensome. *Randstad*, 685 F.3d at 451 (citation omitted). Unless Google does so at the hearing, its burden objections must fail as a matter of law. *Id.*

Indeed, during OFCCP’s limited on-site visit, Google representatives reported that much of the information OFCCP requested is readily available from Google’s electronic databases, belying Google’s claim of undue burden. For example, Director of Compensation Ajit Nambiar reported that salary data, salary history, and job history are stored in one of Google’s many electronic human resources databases. Cynde Bacher, a Google recruiting lead, reported that competing offers are stored in an applicant’s record in yet another electronic database. Several representatives also reported that notes on applicants’ interviews are stored in an electronic database. As noted above, to mitigate Google’s burden, OFCCP has offered to accept those notes in lieu of Google extracting requested information from them. Finally, Ionas Porges-Kiriakou, a Google product manager, reported that the company could write scripts and generate reports to provide some of the data OFCCP requested.

(“Whether enforcement of a subpoena poses an undue burden is typically a fact-intensive inquiry, however, which requires the respondent to show that the actual costs of discovery are unreasonable in light of the particular size of the respondent’s operations.”).

¹⁵ See also *Aaron Bros.*, 620 F. Supp. 2d at 1108 (overruling burden objection where respondents failed to “produce evidence of the size of their operations and their capacity to handle the costs”); *AJD, Inc.*, 2015 WL 7018351, at *5 (holding that failure to prove “capacity-or lack thereof-to handle the costs of complying with the Subpoenas” burden objection failed)

Moreover, publicly available evidence shows that Google cannot make a showing that its business will be operations will disrupt its business. In 2016, Google had approximately \$27.9 billion in operating income on \$89.5 billion in revenue, indicating operating costs of \$61.6 billion. *See* Hrg. Ex. 201 (Alphabet 2016 10-K) at 80. In this frame, Google's unsubstantiated \$1.5 million of data on employees' education, prior experience, prior salary, and competing offers (Hrg. Ex. 9 at 4-5) reflects a miniscule 0.0024% of its 2016 operating costs, a burden OFCCP has offered to take on. Moreover, Google's cry of undue burden is further belied by its business. "At its core, Google has always been an information company," with a mission "to organize the world's information and make it universally accessible and useful." Hrg. Ex. 201 (Alphabet 2016 10-K) at 3. Google, perhaps more than any other contractor, is well-equipped to produce the Subject Items.

c. Even under the analysis applied by the Eleventh Circuit, Google cannot show an undue burden.

Even under the Eleventh Circuit's decision in *EEOC v. Royal Caribbean*, 771 F.3d 757 (11th Cir. 2014), which this Court has cited, Google fails to demonstrate an undue burden.

In rejecting the analysis used by the majority of the circuits, the Eleventh Circuit applied a standard expanding a court's limited review of an administrative subpoena, allowing an evaluation of burden based on "equitable criteria" and performing "a balancing of hardships and benefits." *Id.* at 763 (quoting *EEOC v. Packard Elec. Div., Gen. Motors Corp.*, 569 F.2d 315, 318 (5th Cir. 1978)). Applied to that case, which involved a *single individual's narrow charge of discrimination*, the court held that the EEOC's request for company-wide information was unduly burdensome in light of the "limited need for the subpoenaed information to resolve [the complainant's] claim[.]" *Id.* at 762.

As an initial matter, *Royal Caribbean* rests on case law contrary to the Federal Rules of Civil Procedure and case law in the D.C. and Ninth Circuits, the circuits in which a challenge to a final decision in this case may be brought, *see* 28 U.S.C. § 1391(e)(1). In deciding that burden may be evaluated through a balancing test, *Royal Caribbean* relied on *Packard*, which cited Federal Rule of Civil Procedure 45(c) to suggest such a test exists. *See Packard*, 569 F.2d at 318. However, as noted above, applying Rule 45 to an administrative subpoena directly contradicts the advisory committee comments to that Rule. Moreover, *Packard* is contrary to D.C. Circuit and Ninth Circuit case law. The D.C. Circuit is among the majority of circuits requiring proof that compliance “threatens to unduly disrupt or seriously hinder normal operations of a business.”¹⁶ *Texaco, Inc.*, 555 F.2d at 882; *see also Boehringer Ingelheim*, 898 F. Supp. 2d at 174 (contrasting *Texaco* standard to what Rule 26 requires). And, as noted above, the Ninth Circuit has made clear that enforcing administrative subpoenas does not rest on “interpretations of the discovery provisions of the Federal Rules of Civil Procedure.” *Deer Valley Unified Sch. Dist.*, 968 F.2d at 906. In short, neither the D.C. Circuit nor the Ninth Circuit is likely to look on the reasoning or analysis of the Eleventh Circuit’s *Royal Caribbean* analysis with favor.

Yet, even if balancing equitable factors were appropriate, the balancing of such factors here tip sharply in OFCCP’s favor. *First*, unlike the employer in *Royal Caribbean*, Google is a government contractor that has accepted government funds. It is not just a standard private

¹⁶ Indeed, the Fifth Circuit applies the same test, raising questions about the *Packard* balancing test’s viability within the Fifth Circuit. *See Chevron*, 186 F.3d at 649 (“[A] subpoena is not unreasonably burdensome unless compliance threatens to unduly disrupt or seriously hinder normal operations of a business.”). The only other mention of *Packard*’s balancing test in Fifth Circuit case law was in *FTC v. Jim Walter Corp.*, 651 F.2d 251 (5th Cir. 1981). There, consistent with *Chevron*, the Fifth Circuit put the balancing of “hardships and benefits” in the context of whether complying with a subpoena “threatens to unduly disrupt or seriously hinder normal operations of a business.” *Id.* at 258.

employer subject to application of federal law like all citizens and business entities, such as Royal Caribbean. Instead, Google operates with and receives the benefit of federal money as a federal contractor and as a condition of entering into that contract, Google agree to provide information for compliance audits, such as this one by OFCCP. Google, unlike Royal Caribbean, understood and specifically waived any objection to being subject to OFCCP's audit of the workforce identified in its AAP. *See* Expedited Procedures Order at 3 (noting Google's "significant obstacle on any Fourth Amendment defense because it consented to Government intrusion when it agreed to the government contract").

Second and relatedly, Google's consent to compliance evaluations was in the context of, among other things, obtaining a five-year contract valued at \$25 million.

Third, weighing heavily and decisively in favor of OFCCP is its obligation to conduct a comprehensive, establishment-wide evaluation of Google's compensation practices (*see* 41 C.F.R. § 60-1.20(a)), which requires establishment-wide data to complete such an evaluation. Far from the single complaint of individual discrimination which the EEOC was investigating in relation to a *non*-federal contractor in *Royal Caribbean*, OFCCP is tasked here with conducting an establishment-wide audit of Google's headquarters. Unlike *Royal Caribbean*, Google cannot advance any sort of argument that information and data regarding *all* of its employees at headquarters is not just relevant to OFCCP's task here. Given the scope of Google's AAP, such data are fundamental to OFCCP's task of completing a system-wide audit of Google's headquarters. The task before OFCCP is a large one, bearing no resemblance to the narrow individual complaint of discrimination considered by the Eleventh Circuit in *Royal Caribbean*.

As the Court has recognized, on the other side of the scale is only Google's claim regarding the cost of compiling information on its employees' education, prior experience,

competing offers, and prior salary. However, this cost should be given no weight. OFCCP has offered to take on this entire burden, eliminating Google's claimed cost of production. Even if Google had to bear this burden, its purported cost amounts to 0.0024% of the company's 2016 operating costs.

Further diminishing any weight to any burden Google claims it will suffer is the fact that Google created much of the burden about which it now complains. As the Court noted,

Google could have asked OFCCP to allow it develop an affirmative action plan that would be based on employees' functions rather than the geographically-based establishment in which they work. That might have limited the breadth of the affirmative action plan. But Google did not do that.

Summ. J. Order at 6.

d. The amount Google has received under the AIMS Contract is irrelevant to the analysis of Google's burden.

In evaluating Google's undue burden, the Court has suggested that a revenue-based burden test may be appropriate. Summ. J. Order at 5 (noting being "focused more on" Google receiving \$600,000 on the AIMS Contract). However, this runs contrary to decades-old Supreme Court and Secretary decisions, which have rejected employers' constitutional challenges based on how much the employer receives in exchange for complying with regulations. Indeed, Google has never argued that what it has received as a federal contractor is the appropriate measure of its undue burden.

The Supreme Court decided long ago that regulation imposing a cost on a business without any direct compensation in return does not violate the Constitution. In *Day-Brite Lighting v. Missouri*, the Court held constitutional a state statute requiring an employer to give its employees paid leave to vote. 342 U.S. 421, 423-24 (1952). The Court rejected the idea that

it was unconstitutional for an “employer [to] pay wages for a period in which the employee performs no services.” *Id.* at 424. The Court explained,

Of course many forms of regulation reduce the net return of the enterprise; yet that gives rise to no constitutional infirmity. Most regulations of business necessarily impose financial burdens on the enterprise for which no compensation is paid. Those are part of the costs of our civilization.

Id. (citations omitted).

Relying on *Day-Brite*, a Secretary’s decision binding on this Court applied this principle to OFCCP’s enforcement of Executive Order 11246. In *OFCCP v. Coldwell Banker*, the Secretary rejected an employer’s complaint that complying with the Executive Order was unconstitutional because “the limited income it receives as a result of its dealings with the Government does little more than cover its expenses of compliance.” No. 78-OFCCP-12, 1987 WL774229, at *6 (U.S.D.O.L. Sec’y Aug. 14, 1987). The Secretary held,

[T]he constitutionality of the applicability of the Executive Order does not turn on whether, as applied to a particular contractor, the contractor’s government derived revenues exceed costs associated with compliance. Cost alone does not make application of a law unconstitutional.

Id. at 7 (citing *Day-Brite*).¹⁷

In light of *Day-Brite* and *Coldwell Banker*, a revenue-based undue burden test would be erroneous. Moreover, a sliding scale of compliance based on the amount a specific contractor has received from federal contracts would create perverse results in which government contractors that create AAPs encompassing large workforces, like Google, could avoid a full compliance evaluation of their workforce simply because the amount they have received hovers around their purported cost of compliance. Indeed, such a rule would also mean that contractors early on in their contract’s term, and thus having received fewer payments on the contract, would

¹⁷ While the Secretary compared the cost of compliance with what Coldwell Banker would receive from the federal government, the Secretary ultimately determined that comparison was not relevant. 1987 WL774229, at *7.

be subject to lesser requirements than those further along in their performing their contracts. There is no legal basis to discriminate among federal contractors based on where they are in their contract's term.¹⁸ Plainly, once a contractor meets the relevant regulatory contract threshold, that contractor must comply fully with the regulation.

Nonetheless, given the Court's announced interest in how much Google has received from federal business, OFCCP will be prepared at the hearing to present evidence on Google's attempts to obtain federal business and the substantial volume of such business. For instance, in 2010, Google sued the Department of Interior along with its reseller Onix Networking Corporation in an effort to obtain the Department's business. *See generally* Hrg. Ex. 208 (*Google, Inc. v. United States* complaint). Following that lawsuit, in 2012, a seven-year, the Interior Department awarded a \$34.9 million contract to Onix to provide Google's services. Hrg. Ex. 209 ("Google Wins U.S. Contract," *Wall Street Journal* article on \$34.9 million contract). Since receiving this 2012 contract, Google has obtained federal contracts valued over \$27 million, including the AIMS Contract. *See* Hrg. Ex. 2 at 3 (estimating \$5 million in annual sales under five-year AIMS Contract); Hrg. Ex. 203 (approx. \$2.6 million cloud subcontract) at 3.

D. In Addition to Being Irrelevant, OFCCP's Preliminary Findings Are Protected from Disclosure.

The Court has already established that OFCCP's preliminary findings have no bearing on whether the agency is entitled to those materials. As the Court has explained, "OFCCP need not engage in an iterative process with Google, explaining the status of the investigation when it

¹⁸ Even if the contract value were relevant to the analysis, the undue burdensome analysis would have to consider the *value* of the contract, not the amount *received* under the contract. *See, supra*, § IV.A. That value is defined by "the total amount of orders the parties reasonably anticipate to be placed during the life of the contract." *Star Machinery*, 1983 WL 509225, at *3. Tying compliance to the value of the contract anticipated by the parties makes more sense than comparing what was because it provides context to the contractor's agreement to comply with its equal opportunity obligations. For instance, here, Google agreed that it would be subject to compliance evaluations, and their attendant cost, when it sought and agreed to a \$25 million five-year contract with the GSA.

requests further information.” Summ. J. Order at 7 (citing *United Space Alliance v. Solis*, 824 F. Supp. 2d 68, 91 (D.D.C. 2011); *Morton Salt*, 338 U.S. at 652). Thus, OFCCP’s preliminary findings are irrelevant to this case.

Separate from being irrelevant, OFCCP’s preliminary findings and initial impressions are protected at least by the deliberative process and investigative files privileges, both of which are explained below.

1. The deliberative process privilege protects OFCCP’s internal discussions and analyses in the ongoing compliance evaluation.

“The deliberative process privilege covers communications that are pre-decisional and deliberative.” *Nat’l Sec. Archive v. CIA*, 762 F.3d 460, 463 (D.C. Cir. 2014). The privilege is based on the principle that if “agencies were to operate in a fishbowl, the frank exchange of ideas and opinions would cease and the quality of administrative decisions would consequently suffer.” *Id.* (citation omitted). “[A]gency officials should be judged by what they decided, not for matters they considered before making up their minds.” *Id.* (citation omitted).

Material is predecisional “if it was prepared in order to assist an agency decisionmaker in arriving at his decision.” *Carter v. U.S. Dep’t of Commerce*, 307 F.3d 1084, 1089 (9th Cir. 2002) (citation omitted); *Nat’l Sec. Archive*, 762 F.3d at 463 (“To be pre-decisional, the communication (not surprisingly) must have occurred before any final agency decision on the relevant matter.”). Material is deliberative if it “is intended to facilitate or assist development of the agency’s final position on the relevant issue.” *Nat’l Sec. Archive*, 762 F.3d at 463; *see also United States v. Fernandez*, 231 F.3d 1240, 1246 (9th Cir. 2000) (deliberative material is that which is “related to the process by which policies are formulated”).

Here, OFCCP’s preliminary findings and impressions are both predecisional and deliberative. They are predecisional because OFCCP has not yet determined whether Google has

complied with its equal opportunity obligations. They are deliberative as they are part of the process by which OFCCP is making that determination. Thus, the deliberative process privilege applies.

2. The investigative files privilege also protects OFCCP's internal analyses and deliberations in the ongoing compliance evaluation.

Google has not contested OFCCP's invocation of the investigative files privilege, which also protects OFCCP's internal analyses and deliberations. That privilege protects "informal investigatory material and preliminary determinations." *NLRB v. Silver Spur Casino*, 623 F.2d 571, 580 (9th Cir. 1980).¹⁹ As explained above, OFCCP's internal analyses and deliberations as part of the ongoing compliance evaluation constitute investigatory material and preliminary determinations.

V. Estimate of Amount of Time Required to Present Party's Case

As noted above, OFCCP will be proving the relevance of the Subject Items, while Google must prove its undue burden in producing them. Thus, OFCCP's case-in-chief will focus on explaining the Subject Items and their relevance, whereas Google's case-in-chief should focus on its undue burden.

Not including an opening and closing argument, OFCCP estimates that its case-in-chief will require approximately two hours to present evidence. OFCCP may present rebuttal evidence based on Google's presentation regarding its burden in its case-in-chief.

¹⁹ See also *Perez v. Blue Mountain Farms*, NO: 2:13-CV-5081-RMP, 2015 WL 11112414, at *3 (W.D. Wash. Aug. 10, 2015) (noting qualified investigative files privilege "applies to informal investigatory material and preliminary determinations") *Solis v. Seafood Peddler of San Rafael, Inc.*, Case No. 12-cv-0116 PJH (NC), 2012 WL 12547592, at *6 (N.D. Cal. Oct. 16, 2012) (same); *United States v. Graham*, 555 F. Supp. 2d 1046, 1048 (N.D. Cal. 2008) ("The Ninth Circuit has explained that the investigatory privilege applies to the 'informal deliberations of all prosecutorial agencies and branches of the government.'") (quoting *Silver Spur Casino*, 623 F.2d at 580).

VI. Any Appropriate Comments, Suggestions or Information

The parties have numbered the exhibits for the hearing in a manner intended to identify the offering party:

- **Hearing Exhibits 1-99:** Joint Exhibits
- **Hearing Exhibits 100-199:** Google's Exhibits
- **Hearing Exhibits 200-299:** OFCCP's Exhibits

To make the upcoming hearing more efficient, OFCCP respectfully requests that the Court accept the parties' joint exhibits into the evidentiary record without the need for formally offering the exhibit at the hearing.

Respectfully submitted,

Date: March 28, 2017

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APPENDIX A

OFCCP v. Google Inc. (Case No. 2017-OFC-00004) **Parties' Stipulated Facts**

1. Google is a wholly-owned subsidiary of Alphabet, Inc. It offers, among other things, Internet advertising services. It is headquartered at 1600 Amphitheatre Parkway in Mountain View, CA.
2. Since at least June 2, 2014, Google has had 50 or more employees.
3. On June 2, 2014 Google was awarded a contract of \$100,000 or more (Contract No. GS07F227BA for "Advertising and Integrated Marketing Solutions" from the General Services Administration ("AIMS Contract").
4. The AIMS Contract consists of four sets of documents: (1) the Government's solicitation, a true and correct copy of which is identified as Hearing Exhibit 1; (2) Google's offer, dated July 2, 2013; (3) Google's Final Proposal Revision, submitted May 6, 2014, a true and correct copy of which is identified as Hearing Exhibit 2; and (4) the relevant Standard Form 1449 and its continuing pages, a true and correct copy of which is identified as Hearing Exhibit 3.
5. The AIMS Contract contains provisions requiring Google to comply with Executive Order 11246, VEVRAA, and the Rehabilitation Act and the implementing regulations promulgated pursuant to each. Under the AIMS Contract, Google agreed to, among other things, "comply with Executive Order 11246, as amended, and the rules, regulations, and orders of the Secretary of Labor" and

permit the Government to inspect and copy any books, accounts, records (including computerized records), and other material that may be relevant to the matter under investigation and pertinent to compliance with Executive Order 11246, as amended, and rules and regulations that implement the Executive Order.
6. Google sent a letter dated April 23, 2014 to the General Services Administration regarding the company's offer in response to Solicitation Number 7FCB-H2-070541-B, Refresh 16. A true and correct copy of that letter is identified as Hearing Exhibit 4.
7. On or about September 30, 2015, Google received a scheduling letter from OFCCP's San Jose District Office, notifying the company that its Mountain View facility had been "selected . . . for a compliance evaluation" in the form of a "compliance review." A true and correct copy of that scheduling letter and its attachment is identified as Hearing Exhibit 5.
8. For the purpose of the hearing, Google will not assert a defense based on how OFCCP selected the Company for the compliance evaluation at issue in this proceeding, nor does

Google assert that OFCCP failed to follow its neutral selection process in selecting Google for the compliance evaluation at issue in this proceeding.

9. On or about November 19, 2015, Google submitted a cover letter as well as its Executive Order 11246 Affirmative Action Plan, Affirmative Action Plan for Individuals with Disabilities, and Affirmative Action Plan for Covered Veterans for its Mountain View, California facility to OFCCP.
10. By email dated November 24, 2015 from Daniel V. Duff to Gregory Smith, Google provided its response to Itemized Listing Number 19 of the Scheduling Letter to OFCCP, which consisted of an Excel spreadsheet containing individualized compensation data for the 21,144 Google employees in its Mountain View affirmative action plan as of September 1, 2015; the spreadsheet contained the following column titles: Employee ID; Hire Date; Race; Gender; Job Title; EEO-1 Category; Job Group; Location; Salary; Merit Increase; Annual Bonus; Bridging Bonus; Commission – Quarter 1; Commission – Quarter 2; Commission Quarter - 3; Commission – Quarter 4; Commission Adjustment; Sales Bonus Payment; EMG Award; Fix Term Incentive; Holiday Bonus; ENG Mission Control Bonus; On Call Pay; Patent Pay; Peer Recognition Pay; Referral Bonus; Retention Bonus; Sign On Bonus; Spot Recognition Pay; Google Ventures Bonus; and Waze Referral Bonus.
11. By email dated December 29, 2015 from Daniel V. Duff to OFCCP Compliance Officer Carolyn Mcham Menchyk, Google provided additional compensation data for the 21,144 Google employees in its Mountain View affirmative action plan as of September 1, 2015, producing an Excel spreadsheet containing the data previously provided and the following new column titles: State; Job Grade; FT/PT %; FT/PT Hours; FLSA; Department.
12. By email dated February 5, 2016 from Daniel V. Duff to OFCCP Compliance Officer Carolyn Mcham Menchyk, Google provided additional compensation data for the 21,144 Google employees in its Mountain View affirmative action plan as of September 1, 2015, producing an Excel spreadsheet containing the data previously provided and the following new column titles: RSUs.
13. By email dated April 8, 2016 from Daniel V. Duff to OFCCP Assistant District Director Agnes Huang, Google provided additional compensation data for the 21,144 Google employees in its Mountain View affirmative action plan as of September 1, 2015, producing an Excel spreadsheet containing the data previously provided and the following new column titles: Award Date = 01apr2015; Award Date 01jul2015; Award Date = 01oct2014; Award Date = 03dec2014; Award Date = 03jun 2015; Award Date = 09Sept2014; Award Date = 04feb2015; Award Date = 04Mar2015; Award Date = 05aug2015; Award Date = 05nov2014; Award Date = 06may2015; and Award Date= 07jan2015.
14. On June 1, 2016, OFCCP requested that Google produce:

- a. "a compensation database with a 9/1/2014 snapshot," for all employees in Google's corporate headquarters affirmative action plan ("AAP") as of September 1, 2014, including all factors OFCCP previously requested for employees in its corporate headquarters AAP as of September 1, 2015, as well as the additional factors set forth in OFCCP's June 1, 2016 letter;
- b. "job history" and "salary history" for all employees in Google's corporate headquarters AAP as of September 1, 2015, and for all employees in Google's corporate headquarters AAP as of September 1, 2014; and
- c. the "names" and "employee contact information" for all employees in Google's corporate headquarters AAP as of September 1, 2015, and for all employees in Google's corporate headquarters AAP as of September 1, 2014 (hereinafter "the Subject Items/Demands").

A true and correct copy of the letter requesting these items is identified as Hearing Exhibit 6.

- 15. After receipt of OFCCP's June 1, 2016 letter, Google sent a letter to OFCCP on June 17, 2016. A true and correct copy of that letter is identified as Hearing Exhibit 7.
- 16. On June 23, 2016, OFCCP Assistant District Director Agnes Huang responded to Google's June 17, 2016 letter. A true and correct copy of that letter is identified as Hearing Exhibit 8.
- 17. On June 30, 2016, Google sent a letter to OFCCP Deputy Regional Director Jane Suhr. A true and correct copy of that letter is identified as Hearing Exhibit 9.
- 18. By Biscom web-based message dated August 1, 2016, Google provided additional compensation data for 21,144 Google employees in its Mountain View affirmative action plan as of September 1, 2015, producing an Excel spreadsheet containing data previously provided and the following new column headers: Department Hired Into; Campus or Industry Hire; Date of Birth; Hiring Manager; Pay Locality; Market Reference Point; 2013 Performance Rating; 2014 Performance Rating; 2015 Performance Rating; Job Code; Job Family; and) Level; Manager; Organization; Current Compa Ratio; 2013 Bonus Target; 2014 Bonus Target; and 2015 Bonus Target.
- 19. On September 2, 2016, Google sent a letter to OFCCP's Assistant District Director. A true and correct copy of that letter is identified as Hearing Exhibit 10.
- 20. On or around September 16, 2016, OFCCP served a notice to show cause why enforcement proceedings should not be initiated ("Show Cause Notice"). A true and correct copy of that Show Cause Notice is identified as Hearing Exhibit 11.

21. On October 19, 2016, Google sent a letter to OFCCP, responding to the Show Cause Notice. A true and correct copy of that letter is identified as Hearing Exhibit 12.
22. On November 9, 2016, OFCCP Regional Director Janette Wipper responded to Google's October 19, 2016 letter. A true and correct copy of that letter is identified as Hearing Exhibit 13.
23. On November 29, 2016, the parties held a teleconference regarding the Show Cause Notice.
24. On December 6, 2016, Google sent a letter to OFCCP Regional Director Janette Wipper to follow up on the November 29, 2016 teleconference. A true and correct copy of that letter is identified as Hearing Exhibit 14.
25. On December 20, 2016, counsel for OFCCP wrote Google about potential enforcement proceedings being initiated based on the parties' dispute over the Subject Items/Demands. A true and correct copy of that letter is identified as Hearing Exhibit 15.
26. On December 28, 2016, Google responded to OFCCP's counsel's December 20 letter. A true and correct copy of that letter is identified as Hearing Exhibit 16.
27. Since OFCCP requested the Subject Items in June 2016, the parties have exchanged multiple communications and held several teleconferences regarding the Subject Items/Demands. For instance, the parties held teleconferences on June 14, 2016; August 25, 2016; September 22, 2016; and November 29, 2016, and counsel for OFCCP and counsel for Google held a teleconference on December 23, 2016. During these teleconferences, the parties discussed their positions regarding the Subject Items/Demands.
28. For the purposes of the hearing, Google will not assert a defense that OFCCP failed to conciliate.
29. By Biscom web-based message dated January 1, 2017, Google provided additional compensation data for 21,144 Google employees in its Mountain View affirmative action plan as of September 1, 2015, producing an Excel spreadsheet containing data previously provided and the following new column titles: Award Type 01apr2015; Award Type 01jul2015; Award Type 01oct2014; Award Type 03dec2014; Award Type 03Jun2015; Award Type = 03sep2014; Award Type 04feb2015; Award Type 04mar2015; Award Type 05aug2015; Award Type 05nov2014; Award Type 06may2015; Award Type 07Jan2015.
30. By Biscom web-based message dated on or around February 1, 2017, Google provided citizenship and visa-related data for more than 20,000 employees, producing an Excel spreadsheet containing the following column titles: employee ID, country of citizenship, secondary country of citizenship, visa (yes/no), visa type, and place of birth.

CERTIFICATE OF SERVICE

I am a citizen of the United States of America. I am over eighteen years of age and am not a party to the within action. My business address is 90 7th Street, Suite 3-700, San Francisco, California 94103.

On March 28, 2017, I served the attached **PLAINTIFF'S PREHEARING STATEMENT** on Defendant Google Inc. through serving its attorneys below via an in-person exchange with the attorneys' courier at my business address, pursuant to the parties' agreement:

Duff, Daniel V., III (Daniel.Duff@jacksonlewis.com);
Camardella, Matthew J. (CamardeM@jacksonlewis.com);
Sween, Lisa Barnett (Lisa.Sween@jacksonlewis.com);
Raimundo, Antonio (Antonio.Raimundo@jacksonlewis.com);
Suits, Eric (Eric.Suits@jacksonlewis.com)

I declare under the penalty of perjury that the foregoing is true and correct and that this declaration was executed in Los Angeles, California on March 28, 2017.



MARC A. PILOTIN
Trial Attorney